



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 26, 2004

Mr. Blake G. Powell
Powell & Leon
1706 West Sixth Street
Austin, Texas 78703-4703

OR2004-3372

Dear Mr. Powell:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 200288.

The Cooper Independent School District (the "district"), which you represent, received a request for the following information regarding a named employee: (1) any reports, notes, statements or memoranda which reflect a chronology of the conduct reported and/or the investigation which was performed by the district, (2) the named employee's application for employment, as well as any documents submitted in support of that application, (3) any memoranda or other documents evidencing administrative reprimands or other disciplinary measures, (4) any documents between the district and the named employee that relate to the named employee's employment, (5) the named employee's teacher service record, and (6) any other relevant information. You state that the district has no objection to releasing some of the requested information. However, you claim that the remaining requested information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that although you claim that employee appraisal instruments, which are responsive to item number six of the request, are excepted from disclosure, you have not submitted this information to our office for review. See Gov't Code § 552.301(e)(1)(D). Because you have not submitted the responsive employee appraisal instruments, we conclude that you have failed to comply with section 552.301 with respect to this information. Therefore, the appraisal instruments are presumed to be public and must be released, to the

extent they exist, unless there is a compelling reason to withhold the information from the public. Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See Open Records Decision No. 630 (1994)*. However, because you did not submit the employee appraisal evaluations for our review, we have no basis for concluding that this information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. We therefore conclude that the district must release the responsive appraisal instruments to the requestor pursuant to section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

We now address your arguments regarding the submitted information. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *Open Records Decision No. 676 at 6-7 (2002)*.

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Finally, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that

the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

Upon review of your representations and the information at issue, we agree that some of the submitted information, which we have marked, is protected by the attorney-client privilege and may be withheld under section 552.107 of the Government Code. However, we determine that the district has failed to demonstrate that the remaining information constitutes communications between or among clients, client representatives, lawyers, or lawyer representatives. Therefore, this information may not be withheld under section 552.107(1). *See Open Records Decision No. 676 at 6-11 (2002)* (delineating demonstration required of governmental body that claims attorney-client privilege under section 552.107(1)).

We note however that a portion of the remaining submitted information contains information that is confidential by law. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, *see Open Records Decision Nos. 600 (1992), 545 (1990)*, some kinds of medical information or information indicating disabilities or specific illnesses, *see Open Records Decision Nos. 470 (1987)* (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and identities of victims of sexual abuse, *see Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982)*. We have marked the information that must be withheld pursuant to section 552.101 and common-law privacy.

We also note that a portion of the remaining submitted information may be excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under

section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, the district may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the district's receipt of this request for information. The district may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election under section 552.024 to keep the information confidential. We have marked the information within Attachment D that the district must withhold under section 552.117(a)(1) if the person to whom the marked information pertains timely elected under section 552.024 to keep the information confidential.

In summary, we have marked the information that the district may withhold under section 552.107 of the Government Code as information protected by the attorney-client privilege. We have also marked a portion of the submitted information that is protected by common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. Provided the former employee at issue timely elected to keep the information confidential, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. Otherwise, this information must be released. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 200288

Enc. Submitted documents

c: Mr. Michael Garcia
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(w/o enclosures)